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No. 05-809

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

DARREL G. ADAMS, Warden, California Department of Corrections and Rehabilitation, *Petitioner*

v.

JAVIER ZAMORA, *Respondent*

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Wayne R. Young
Counsel of Record for Respondent
1247 Lincoln Boulevard, #53
Santa Monica, California 90401
Phone: (310) 394-0241

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QUESTION PRESENTED FOR REVIEW

Petitioner asks this court to resolve a lower court conflict about whether *Crawford* applies retroactively in federal habeas corpus proceedings under *Teague* or 28 U.S.C. 2254(d).

Respondent claims the question presented is whether this is an appropriate case to decide the issue raised by petitioner given that there are independent pre-*Crawford* grounds to affirm the decisions below that the admission of declarant's statements violated the Confrontation Clause.

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v.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Javier Zamora respectfully submits that the petition for a writ of certiorari should be denied.

STATEMENT[1]

Introduction

The district court granted Zamora's § 2254 petition because his Sixth Amendment right to confront his accuser "Cruz" was violated. The court found under *Ohio v. Roberts*, 448 U.S. 56 (1980), that the prosecution failed to prove Cruz was unavailable or his statements reliable.

While the State's appeal was pending in the Ninth Circuit, the Supreme Court held in *Crawford v. Washington*, 541 U.S. 36 (2004), that statements of unavailable witnesses may not be admitted unless the defendant has a prior opportunity for cross-examination. The Ninth Circuit then applied *Crawford* retroactively to Zamora under *Teague v. Lane*, 489 U.S. 288 (1989), and affirmed the district court's grant of his § 2254 petition.

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[1] Respondent Zamora is satisfied with the presentation by petitioner of the opinions below, the statement of jurisdiction, and the constitutional and statutory provisions involved. (Supreme Court Rule 24.2, sections 1(d), (e), and (f)).

The State argues that certiorari should be granted because the Ninth Circuit's holding that *Crawford* is retroactive conflicts with the decisions of other circuits and presents a recurring issue of national importance involving habeas petitioners with Confrontation Clause claims.

Zamora replies that certiorari should be denied in his case because the Ninth Circuit's retroactivity finding was not necessary to decide that Zamora's right to confrontation was violated. The district court's holding, issued prior to *Crawford*, that the admission of Cruz's second and third statements violated *Ohio v. Roberts* provides an independent ground for the grant of Zamora's § 2254 petition and renders certiorari unnecessary in this case.

Cruz's First Statement[2] (October 6, 1999)

Cruz was shot. He made his first statement when the police arrived to investigate. He told the police he and his assailants were all members of the "Avenues" gang. Cruz said "Chayo," Sparky, Speedo's brother, and another came to his apartment and demanded money. When Cruz said he had no money, Sparky "and possibly Chayo" pulled out handguns and began shooting. There was a dispute about whether Zamora was known as "Chayo." (Pet. App. 3-4 n3, 8 n3).

Cruz's Second Statement (October 8, 1999)

Two days later, Officer Rodriquez interviewed Cruz at the hospital. Cruz looked at a book with photographs of fellow members of the Avenues gang. Officer Rodriquez testified Cruz identified a photograph of Zamora as someone he knew as "Child" and claimed he was one of the four assailants. However, Cruz refused to sign his name or circle Zamora's photograph (Pet. App. 8-9).

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[2]The admission of Cruz's first statement as an excited utterance is not at issue here.

Cruz's Third Statement (October 30, 1999)

Three weeks later, Cruz was arrested in a separate case for being a felon in possession of a firearm. He was questioned about who shot him back on October 6, 1999. Cruz told the officers he was drunk in his apartment when Sparky and Speedo's Brother came in demanding money. Zamora and Gallardo joined them. Sparky shot Cruz in the leg and Speedo's Brother shot him in the head. Cruz identified photos of Zamora and the other three assailants (Pet. App. 9-10).

The Remaining Evidence

A defense investigator testified he interviewed Cruz in custody and Cruz denied he was attacked by the defendants. Cruz claimed he was attacked by Mexican nationals who were buying drugs and insisted the four defendants were not involved (Pet. App. 12-13).

Two police gang experts testified the only nickname they knew for Zamora was Popeye and not Chayo or Child (Pet. App. 8 n3).

Zamora put on an alibi defense. His aunt and uncle testified Zamora was living in Rosarito, Mexico when Cruz was shot (Pet. App. 11-12). Another official testified Zamora had been deported from the United States in February of 1999 and had no police contacts until several weeks after the October 6, 1999 shooting (RT 1828-9).

The other eyewitness was Rodriquez, another Avenues gang member who was arrested the day after Cruz was shot. Rodriquez said he saw four guys drag Cruz into his apartment and identified Zamora from a photo as "Child." Rodriquez testified at trial that Zamora was the first person to hit Cruz but admitted on cross-examination he previously testified Zamora never hit Cruz (Pet. App. 3 n2, 8 n3, 11).

California Superior Court

On December 14, 1999, Zamora was charged with attempted murder and related charges. The prosecutor moved for the admission of Cruz's statements (1) at the scene, (2) two days later at the hospital, and (3) three weeks later after his arrest in the gun case.

There were two pretrial hearings on the admissibility of Cruz's second and third statements. The prosecutor claimed Cruz was unavailable to testify in Zamora's case because Cruz intended to exercise his Fifth Amendment right against self-incrimination in his pending gun case. The prosecutor argued Cruz's statements were reliable because they were corroborated by witness Rodriquez and there was no agreement to assist Cruz in his gun case. Defense counsel argued Cruz's statements were not reliable because they were made during police interrogation and Cruz had an expectation of leniency in his gun case (Pet. App. 15-18).

The court held Cruz's statements were admissible. The prosecutor told the jury in her opening statement the evidence would show that Cruz made statements to the police that identified Zamora as one of the persons who "had tried to kill him." (RT 913-17).

Argument resumed during trial about the admission of Cruz's statements. Cruz personally appeared and his counsel told the court Cruz would not testify because the prosecutor "is of the opinion that he would be subject to cross-examination on his case downtown if he were to testify in this matter, and that they are intertwined in a sense." (Pet. App. 17; RT 1201-06).

The court said it intended to declare Cruz was not available :

> "I don't think we needed to ask him any questions. I mean . . . we don't have to go through the drill of doing that unless I am told that I'm supposed to . . . , so unless there is some other comment, then we'll just declare that he is an unavailable witness, legally." (Pet. App. 17; RT 1202).

Zamora also argued Cruz's s[illegible]ents were not reliable and that he would be deprived of an opportunity to cross-examine his client's accuser. The court affirmed its ruling the statements were admissible (Pet. App. 18; RT 1205-06).

The officers testified about Cruz's statements and the prosecutor emphasized during closing argument and rebuttal that Cruz made statements identifying Zamora as one of his assailants (Pet. App. 32; RT 2703-09, 2765-77). The jury found Zamora guilty of attempted murder and the related counts. He was sentenced to 29 years.

California Court of Appeal

Zamora argued on appeal that his right of confrontation was violated by the admission of Cruz's statements because the prosecutor failed to meet her burden of proving that Cruz was unavailable and his statements were reliable. He also argued he was denied effective assistance of counsel because his attorney failed to preserve the Confrontation Clause issue.

Zamora's arguments were rejected in an unpublished decision (Pet. App. 46-58). The court found Zamora waived the unavailability issue because he did not object when Cruz's counsel told the court Cruz would exercise his Fifth Amendment right (Pet. App. 51-53). The court found Cruz's statements trustworthy and found trial counsel was not ineffective because Zamora's defense was arguably better than if Cruz had actually testified (Pet. App. 53-58).

California Supreme Court

Zamora filed a petition for review in the California Supreme Court raising the same Confrontation Clause issues he raised in the Court of Appeal. On January 3, 2002, the petition for review was denied without comment (Pet. App. 45).

Zamora's § 2254 Petition in Federal District Court

On April 11, 2002, Zamora filed a § 2254 petition arguing his right of confrontation was violated by the admission of Cruz's statements. On October 1, 2003, the Magistrate filed a Report recommending that Zamora's petition be granted because the admission of Cruz's second and third statements violated the Confrontation Clause (Pet. App. 6-44).

The Report found the State had not met its burden under *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), of proving Cruz unavailable. It was unreasonable to find that Cruz would incriminate himself on his subsequent felon in possession of a gun case by testifying at Zamora's trial about who shot him, particularly since Cruz admitted he possessed the gun (Pet. App. 20-25).

Even if Cruz was unavailable, the Report found that Cruz's statements were not trustworthy (Pet. App. 25-29). The state court decision "contradicted clearly established federal law by considering independent corroborating evidence (that is Rodriquez's testimony) to bolster the trustworthiness of Cruz's statements." (Pet. App. 25). Cruz had a motive to fabricate because his statements were made while he was under investigation for a firearm violation (Pet. App. 29).

The Report concluded the error was prejudicial because of the weakness of the State's case (Pet. App. 29-33). Without Cruz's second and third statements, there was little evidence Cruz identified Zamora because it was unclear whether the "Chayo" that Cruz identified in his first statement was Zamora. The other evidence linking Zamora to the offense was weak and Zamora had a credible alibi he was in Mexico when Cruz was shot. Zamora's counsel was ineffective for failing to preserve the Confrontation Clause objections (Pet. App. 34-38). On November 12, 2003, the district court adopted the Report without change (Pet. App. 5).

The Ninth Circuit's Decision

The Ninth Circuit affirmed (Pet. App. 1-4). Relying on the recently decided case of *Bockting v. Bayer*[3], 399 F.3d 1010 (9th Cir. 2005), the court found that *Crawford* applied retroactively. The court held that the decision of the California Court of Appeal in Zamora's case was contrary to *Crawford* because Zamora did not have an adequate opportunity to cross-examine Cruz (Pet. App. 3). The court next found Zamora was prejudiced within the meaning of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), because the State's case was weak absent Cruz's second and third statements (Pet. App. 3-4). The Ninth Circuit did not address the finding of the district court that the admission of Cruz's statements violated *Ohio v. Roberts* and its pre-*Crawford* lineage.

The State's Petition For A Writ Of Certiorari

The State's petition for a writ of certiorari argues that the Ninth Circuit's holding in Zamora's case and in *Bockting*, that *Crawford* is retroactive, has created an intolerable split among the circuit courts and presents an important issue involving thousands of state and federal habeas petitioners with Confrontation Clause claims. The State argues *Crawford* is a new rule because it overruled *Ohio v. Roberts* but that it is not a watershed rule that requires retroactive application on habeas. The State further argues that the Ninth Circuit's finding that § 2254(d)(1) incorporates the *Teague v. Lane* exceptions conflicts with the rulings of other courts.

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[3]Neveda's petition for a writ of certiorari in *Bockting* is pending (*Whorton v. Bockting*, S. Ct. No. 05-595, docketed November 10, 2005).

REASON FOR DENYING THE PETITION

CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S RETROACTIVE APPLICATION OF *CRAWFORD* WAS NOT NECESSARY TO A FINDING THAT ZAMORA'S RIGHT OF CONFRONTATION WAS VIOLATED.

Introduction

Certiorari should be denied because this case is an inappropriate vehicle to resolve the question presented by the petitioner Warden. Even assuming that this Court's review of the question proffered by petitioner is warranted, certiorari should be denied here because the district court's decision that the admission of Cruz's statements violated *Ohio v. Roberts* provides an independent ground for the granting of Zamora's § 2254 petition. The Ninth Circuit's retroactive application of *Crawford* was thus not necessary to a finding that Zamora's right to confrontation was violated by the admission of Cruz's statements.

The Sixth Amendment's Confrontation Clause provides a criminal defendant the right to cross-examine adverse witnesses. The admission of out of court statements implicates the Confrontation Clause because the defendant is denied his right to confront his accuser.

In *Ohio v. Roberts*, the Court held that the Sixth Amendment right of confrontation does not bar admission of an unavailable witness's statement against a criminal defendant if the statement meets two tests. First, the prosecution bears the burden to establish the declarant is unavailable: "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65.

Second, the prosecution has the burden of demonstrating that the statement bears adequate "indicia of reliability." *Id.* at 66. A statement is sufficiently reliable when it either (1) falls

within a "firmly rooted hearsay exception" or (2) bears "particularized guarantees of trustworthiness." *Id.*

Reliability is presumed if the statement falls within a firmly rooted hearsay exception. *White v. Illinois*, 502 U.S. 346, 356-57 (1992). The trustworthiness of a statement must spring from the circumstances giving rise to the statement and not from independent collaborating evidence. Those circumstances must render the statement "so trustworthy that adversarial testing would add little to its reliability." *Idaho v. Wright*, 497 U.S. 805, 819-21 (1990).

In *Lilly v. Virginia*, 527 U.S. 116 (1999)(plurality opinion), the Court held that the admission of the statement of a non-testifying accomplice to a police officer was inherently suspect because it shifted the blame from the accomplice to the defendant and it was "obviously obtained for the purpose of creating evidence that would be useful at a future trial." *Id.* at 125.

Finally, the Court held in *Crawford* that statements of unavailable witnesses may not be admitted unless the defendant has a prior opportunity for cross-examination. The Court held that actual confrontation is the only reliability test the Sixth Amendment permits.

It was thus firmly established prior to *Crawford* that the Sixth Amendment Confrontation Clause requires the proponent of an out-of-court statement to demonstrate that the witness is unavailable and that the statement is reliable.

As explained below, the district court in Zamora's case found, based on clearly established pre-*Crawford* law, that it was unreasonable for the state courts to conclude Cruz was unavailable or that his statements were reliable. Therefore, certiorari should be denied here because the Ninth Circuit's holding that *Crawford* is retroactive was not necessary to affirm the grant of Zamora's § 2254 petition.

Cruz's Unavailability

The issue of whether Cruz was unavailable is preceded by a procedural dispute. The state appellate court did not address the merits of the unavailability argument because it found that Zamora's trial counsel did not object when Cruz's counsel told the court Cruz would exercise his Fifth Amendment right (Pet. App. 51-53). The federal district court, in turn, held the State waived any claim that Zamora procedurally defaulted on the unavailability issue because it failed "to raise it in the answer to the petition." (Pet. App. 21-22 n9).

On the merits, the district court held the State had not demonstrated Cruz was unavailable (Pet. App. 22-25). The court found that *Ohio v. Roberts* put the burden on the prosecution to show that Cruz was unavailable. Although a defendant's invocation of his Fifth Amendment privilege against self-incrimination may render him unavailable to testify in another proceeding, the court must decide whether the witness has a "good-faith basis for invoking the privilege" because the hazard of incrimination does not arise from the "apparently inexplicable legal opinion of the arguably less than disinterested prosecutor in petitioner's case." (Pet. App. 25).

The district court next found that the prosecution failed to demonstrate that Cruz would incriminate himself on his firearm case by testifying at Zamora's trial. The prosecution failed to explain how Cruz' testimony about who shot him on October 6, 1999 would incriminate him on the charge that he possessed a firearm on October 30, 1999, particularly because Cruz had already confessed on videotape that he possessed the gun (Pet. App. 22-25).

In sum, the state appellate courts never addressed the merits of the unavailability issue so the only state court decision on that issue is the trial court's holding. The district court found it

was unreasonable for the trial court to conclude that Cruz was unavailable because his testimony in Zamora's attempted murder case was unrelated to and not admissible in Cruz's firearm case.

The Reliability of Cruz's Statements

The state appellate court held that Cruz's second and third statements were trustworthy because they were consistent with his first statement and corroborated by Rodriquez's statement. The court also noted Cruz had no motive to fabricate, was reluctant to talk to the police, subjected himself to retaliation, and never wavered in his identifications (Pet. App. 54-55).

The district court reviewed each of the above factors and found that the state courts unreasonably concluded in light of clearly established Supreme Court law that Cruz's statements possessed the requisite trustworthiness (Pet. App. 25-29). The court first found that the use of Rodriquez' testimony to corroborate Cruz's statements violated the rule of *Idaho v. Wright* and *Lilly* that the reliability of out-of-court statements cannot be established by bootstrapping other evidence (Pet. App. 25-26).

Second, the district court found it was unreasonable for the state courts to conclude that Cruz never wavered in his identification of Zamora because Cruz provided several versions of who shot him (Pet. App. 26). Cruz claimed in his first statement that Sparky and "Chayo" shot him. There was no evidence Zamora was Chayo (Pet. App. 8 n3). Cruz claimed in his second statement that "Child" shot him but refused to sign a photograph of Zamora (Pet. App. 8). Cruz claimed in his third statement that Sparky and Speedo shot him (Pet. App. -10). Cruz later recanted all his identifications during his meeting with investigator Santamaria (Pet. App. 12).

Third, the district court found that Supreme Court precedent required the prosecutor to overcome a presumption that Cruz was unreliable. However, "nothing about the circumstances

establishes that Cruz was particularly likely to be telling the truth when he made his statements to the police." (Pet. App. 27). When Cruz made his second statement two days after he was shot, he was a gang member with a record who faced new charges from the suspected drugs found in his apartment. When Cruz made his third statement several weeks after he was shot, he was in custody on the new charge he was a felon in possession of a firearm. Cruz was not under oath and had a motive to fabricate because his statements were made in response to police questioning while he was under investigation (Pet. App. 26-29).

The district court noted that *Idaho v. Wright* required the prosecutor to show that Cruz's statements were so trustworthy that cross-examination "would add little to their value." (Pet. App. 29). In Zamora's case, the district court held:

> "Considering all the circumstances, it is not reasonable to conclude that cross-examination of Cruz would be of marginal utility. To the contrary, there would be great utility in testing Cruz's version of events by cross-examination." (Pet. App. 29).

The Prejudice To Zamora And The Ineffectiveness Of Trial Counsel

The state appellate court did not make a specific finding about whether Zamora was prejudiced by the admission of Cruz's statements and, as a result, there is no state court decision on prejudice entitled to deference. However, in finding that trial counsel was not ineffective for failing to preserve the Confrontation Clause issue, the state court did find that Zamora's defense may have benefitted from the admission of Cruz's statements because the inconsistencies among them were made apparent to the jury without "without the risk Cruz would explain the inconsistencies in live testimony." (Pet. App. 57-58).

The district court concluded that Zamora was prejudiced by the Confrontation Clause error because of the weaknesses in the State's case (Pet. App. 29-33). In the absence of Cruz's second and third statements, there was no evidence Cruz ever identified Zamora because his first statement implicated Chayo and it was not established that Zamora was Chayo. The other evidence linking Zamora to the crime was weak and Zamora had a credible alibi defense he was in Mexico when Cruz was shot. The court concluded the admission of Cruz's statements had a substantial effect on the verdict. The court also found trial counsel ineffective because he failed to raise Confrontation Clause objections to the admission of Cruz's statements (Pet. App. 34-38).

Conclusion

The district court relied on well established pre-*Crawford* Supreme Court cases and held it was unreasonable for the state courts to conclude that Cruz was unavailable or that his second and third statements were reliable. Therefore, the Ninth Circuit's retroactive application of *Crawford* was not essential to a finding that Zamora's right of confrontation was violated by the admission of Cruz's statements. As a result, it is not necessary in Zamora's case to resolve the conflict among the circuit courts about whether *Crawford* is retroactive. The petition for a writ of certiorari should be denied.

Dated: January 25, 2006

Respectfully submitted,

Wayne R. Young
Counsel of Record
for Respondent Javier Zamora